United Nations A/CN.9/931

General Assembly

Distr.: General
15 January 2018

Original: English

United Nations Commission on International Trade Law
Fifty-first session
New York, 25 June–13 July 2018

Report of Working Group V (Insolvency Law) on the work of its fifty-second session (Vienna, 18–22 December 2017)

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I. Introduction

A. Facilitating the cross-border insolvency of multinational enterprise groups

1. At its forty-fourth session (December 2013), the Working Group agreed to continue its work on cross-border insolvency of multinational enterprise groups[1] by developing provisions on a number of issues, some of which would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency and part three of the UNCITRAL Legislative Guide on Insolvency Law and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. The Working Group discussed this topic at its forty-fifth (April 2014) (A/CN.9/803), forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835), forty-eighth (December 2015) (A/CN.9/864), forty-ninth (May 2016) (A/CN.9/870), fiftieth (December 2016) (A/CN.9/898) and fifty-first (May 2017) (A/CN.9/903) sessions and continued its deliberations at the fifty-second session.

B. Recognition and enforcement of insolvency-derived judgments

2. At its forty-seventh session (2014), the Commission approved a mandate for Working Group V to develop a model law or model legislative provisions providing for the recognition and enforcement of insolvency-related judgments.[2] The Working Group discussed this topic at its forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835), forty-eighth (December 2015) (A/CN.9/864), forty-ninth (May 2016) (A/CN.9/870), fiftieth (December 2016) (A/CN.9/898) and fifty-first (May 2017) (A/CN.9/903) sessions and continued its deliberations at the fifty-second session.

C. Obligations of directors of enterprise group companies in the period approaching insolvency

3. At its forty-fourth session, the Working Group agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in that area and that solutions would be of great benefit to the operation of efficient insolvency regimes (A/CN.9/798, para. 23). At the same time, the Working Group noted that there were issues that needed to be considered carefully so that solutions would not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that an examination of how part four of the Legislative Guide could be applied in the enterprise group context and identification of additional issues (e.g. conflicts between a director's duty to its own company and the interests of the group) would be helpful (A/CN.9/798, para. 23). The Working Group discussed this topic at its forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835) and forty-ninth (May 2016) (A/CN.9/870) sessions. Revisions to the text contained in document A/CN.9/WG.V/WP.153 were noted at the fifty-second session.

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[1] A/CN.9/763, paras. 13–14; A/CN.9/798, para. 16; see the mandate given by the Commission at its forty-third session (2010): *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 259(a)).

[2] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its fifty-second session in Vienna from 18–22 December. The session was attended by representatives of the following States Members of the Working Group: Armenia, Austria, Belarus, Brazil, Bulgaria, Canada, Chile, China, Côte d'Ivoire, Czechia, El Salvador, France, Germany, Greece, Indonesia, Israel, Italy, Japan, Kenya, Kuwait, Mexico, Pakistan, Panama, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, and the United States of America.

5. The session was attended by observers from the following States: Algeria, Belgium, Bolivia (Plurinational State of), Croatia, Cyprus, Dominican Republic, Estonia, Gambia, Lithuania, Luxembourg, Mali, Malta, Morocco, Netherlands, Saudi Arabia, Serbia, Slovenia, Syrian Arab Republic and Viet Nam.

6. The session was also attended by observers from the European Union.

7. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: World Bank Group (WB);

(b) *Invited international intergovernmental organizations*: European Investment Bank (EIB), Gulf Cooperation Council (GCC), and Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Commercial Finance Association (CFA), European Banking Federation (EBF), European Law Institute (ELI), European Law Students' Association (ELSA), Fondation pour le Droit Continental, Groupe de réflexion sur l'insolvabilité et sa prévention (GRIP 21), Ibero-American Institute of International and Economic Law, INSOL Europe, INSOL International, Instituto Iberoamericano de derecho concursal (IIDC), International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), Law Association for Asia and the Pacific (LAWASIA), and Union internationale des avocats (UIA).

8. The Working Group elected the following officers:

Chairman: Wisit Wisitsora-At (Thailand)

Rapporteur: Caroline Egesa Tusingwire (Uganda)

9. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.149);

(b) A note by the Secretariat on the cross-border recognition and enforcement of insolvency-related judgments: draft model law (A/CN.9/WG.V/WP.150);

(c) A note by the Secretariat on the cross-border recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law (A/CN.9/WG.V/WP.151);

(d) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: draft legislative provisions (A/CN.9/WG.V/WP.152);

(e) Note by the Secretariat on directors' obligations in the period approaching insolvency: enterprise groups (A/CN.9/WG.V/WP.153); and

(f) A proposal for future work submitted by the United States (A/CN.9/WG.V/WP.154).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of: (a) the recognition and enforcement of insolvency-related judgments; (b) facilitating the cross-border insolvency of multinational enterprise groups; and (c) directors' obligations in the period approaching insolvency.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group commenced its deliberations on the recognition and enforcement of insolvency-related judgments on the basis of documents A/CN.9/WG.V/WP.150 and A/CN.9/WG.V/WP.151, followed by the cross-border insolvency of multinational enterprise groups on the basis of document A/CN.9/WG.V/WP.152. The Working Group also briefly considered directors' obligations in the period approaching insolvency, noting the revised text contained in document A/CN.9/WG.V/WP.153 and heard a brief introduction to the proposal by the United States of America for possible future work on civil asset tracing and recovery, as contained in document A/CN.9/WG.V/WP.154.

12. The Working Group completed its work by considering a revised text of the draft model law on the recognition and enforcement of insolvency-related judgments, reflecting the deliberations and decisions of the Working Group indicated below. The revised draft text is contained in the annex to this report.

IV. Cross-border recognition and enforcement of insolvency-related judgments: draft model law (A/CN.9/WG.V/WP.150)

13. The Working Group commenced its discussions on the topic by reviewing the text of the draft model law contained in document A/CN.9/WG.V/WP.150.

Preamble

14. The Working Group agreed:

(a) To add the words "recognition and" before enforcement in subparagraph 1(a);

(b) To change the chapeau of paragraph 2 to "This Law is not intended:";

(c) To revise subparagraph 2(a) to read: "To restrict provisions of the law of this State that would permit the recognition and enforcement of an insolvency-related judgment";

(d) To retain the word "replace" and to delete "[or displace]" in subparagraph 2(b); and

(e) To delete the words "to which the judgment is related" at the end of subparagraph 2(d).

15. A proposal to add subparagraph (e) from the preamble of the Model Law on Cross-Border Insolvency (MLCBI) did not receive sufficient support.

Article 1. Scope of application

16. The Working Group agreed to delete the words "in a proceeding taking place". With that change, the Working Group approved the substance of article 1.

Article 2. Definitions

17. The Working Group approved the substance of subparagraphs (a), (b) and (c) as drafted. With respect to subparagraph (d), the Working Group agreed:

(a) To delete the word "foreign" and simply refer to "insolvency-related judgment";

(b) To revise subparagraph (d)(i) as follows: "Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed" and to include in the draft guide to enactment a reference to the origin of the compromise reached on this wording;

(c) To delete subparagraph (iii) and address that issue in the guide to enactment;

(d) To delete the phrase "[and subparagraphs (i), (ii) and (iii) shall apply irrespective of whether or not the proceeding to which the judgment is related has [been concluded] [closed].]" and paragraph 3;

(e) To delete the chapeau and substance of paragraph 1 from the text and to reflect its content in the guide to enactment; and

(f) To retain paragraph 2 in the text.

18. The Secretariat was requested to take those revisions into account in preparing the next draft of the definition.

Article 3. International obligations of this State

19. The Working Group approved the substance of draft article 3, paragraph 1, and agreed that the words in parentheses in paragraph 2 should be deleted.

Article 4. Competent court or authority; Article 5. Authorization to act in another State in respect of an insolvency-related judgment issued in this State

20. The Working Group approved the substance of articles 4 and 5 as drafted.

Article 6. Additional assistance under other laws

21. The Working Group agreed to delete the words "to a foreign insolvency representative" from draft article 6.

Article 7. Public policy exception

22. A proposal to delete the word "manifestly" as being too subjective did not receive support and the substance of draft article 7 was approved as drafted.

Article 8. Interpretation

23. The Working Group approved the substance of article 8 as drafted.

Article 9. Effect and enforceability of an insolvency-related foreign judgment in the originating State

24. The Working Group observed that the heading of article 9 should be aligned with its content and approved the substance of article 9, paragraph 1 as drafted. With respect to paragraph 2, the following proposals were made:

(a) To add the words "whether ordinary or extraordinary" after the phrase "subject of review";

(b) In line with the observation in paragraph 13 of document A/CN.9/WG.V/WP.150, to remove the concept of conditional recognition;

(c) To add "at its discretion or upon the request of an interested party" after the phrase "the court may"; and

(d) To replace the second sentence with text along the lines of "In such cases, the court may impose such conditions as it may deem fit."

25. After discussion, there was insufficient support in the Working Group for adoption of any of the changes proposed for paragraph 2. Reference was made to paragraph 75 of the draft guide to enactment contained in document A/CN.9/WG.V/WP.151, which clarified what was meant by "ordinary review".

26. There was support in the Working Group for a new paragraph 3 along the following lines: "A refusal under paragraph 2 does not prevent a subsequent application for recognition or enforcement of the judgment." After further consideration, the Working Group agreed that paragraph 1 should form article 9 with the heading "Effect and enforceability of an insolvency-related judgment" and that paragraph 2, together with the new paragraph 3, should form a new article 9 bis with the heading "Effect of review in the originating State on recognition and enforcement".

Article 10. Procedure for seeking recognition and enforcement of an insolvency-related foreign judgment

27. The Working Group agreed that paragraph 2 should be (a) "and" (b) "or" (c), as explained in paragraph 16 of document A/CN.9/WG.V/WP.150. There was further agreement to revise subparagraph 2(b) by adding the phrase "where applicable" before "is enforceable", and by retaining the term "pending" without square brackets in subparagraph 2(b), while deleting "[current]".

28. In response to a question about the meaning of paragraph 4, it was explained that the current drafting would be sufficiently flexible to allow a State to require legalization; it was suggested that that point could be clarified in the guide to enactment.

29. The Working Group also agreed to replace paragraph 5 with text along the following lines: "When recognition and enforcement are sought, the party against whom relief is sought has the right to be heard."

Article 11. Provisional relief

30. The Working Group approved the substance of article 11 as drafted.

Article 12. Decision to recognize and enforce an insolvency-related foreign judgment

31. The Working Group agreed to substitute "insolvency representative" for "person or body" in subparagraph (b), and to insert a new subparagraph (d) as follows: "(d) Recognition and enforcement is sought from a court referred to in article 4, or the question of recognition arises by way of defence or as an incidental question before such a court."

Article 13. Grounds to refuse recognition and enforcement of an insolvency-related foreign judgment

32. The following proposals for revision of subparagraphs (a) to (g) were made:

(a) To replace the opening phrase in the chapeau "Subject to article 7" with the phrase "In addition to the ground set forth in article 7";

(b) To delete subparagraph (b) or to provide an explanation in the guide to enactment that addressed the level of proof or evidence required from the party invoking the exception;

(c) To replace the word "between" in subparagraph (d) with the word "involving";

(d) To replace "the debtor's insolvency proceedings" with "any insolvency proceedings to which the judgment is related" in subparagraph (e);

(e) To replace subparagraph (f) with:

"The judgment:

"(i) Materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; and

"(ii) The interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued."

(f) To replace subparagraph (g)(ii) with the following: "The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that the defendant argued on the merits before the court without objecting to jurisdiction or to the exercise of jurisdiction within the time frame provided in the law of the originating State, unless it was evident that such an objection would not have succeeded under that law;" and

(g) To retain the word "incompatible" in subparagraph (g)(iv) without square brackets and to delete the word "[inconsistent]".

33. The Working Group accepted the proposals listed above in subparagraphs (a), (b), (c), (e), (f) and (g). With respect to subparagraph (d), a further proposal was made to replace article 13, subparagraph (e), with text along the following lines: "Recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings, including by conflicting with a stay or other order that could be recognized or enforced in this State." That proposal was taken up by the Working Group.

34. A proposal to replace "may" in the chapeau of article 13 with "shall" did not receive sufficient support. It was noted, however, that the guide to enactment could explain that in some legal traditions, once one of the grounds enumerated in article 13 was found, the court must refuse recognition and enforcement.

35. The Working Group agreed to the changes to subparagraph (h) proposed in paragraph 31 of document A/CN.9/WG.V/WP.150, subject to a variation of the last words of subparagraph (h)(ii) to read "at the time the proceeding in the originating State commenced." A further proposal made to expand the reference to "assets" in subparagraph (h)(ii) to include causes of action that were properly brought in the originating State received insufficient support.

36. In response to a question as to whether subparagraph 13(h) was limited to States that had enacted the MLCBI, it was observed that there was nothing to prevent non-enacting States from adapting that provision to their own use, and that that matter might be addressed in the guide to enactment.

Article 14. Equivalent effect

37. The Working Group noted that in the most recent text emanating from the November 2017 Special Commission on Recognition and Enforcement of Foreign Judgments of the Hague Conference on Private International Law, the provision equivalent to article 14 had been deleted. Having deleted the article, the Special Commission decided that the Explanatory Report to the draft convention should: (a) note that it was inherent in the concept of recognition of a judgment that the same claim (or cause of action) could not be re-litigated in another Contracting State

(*res judicata*); and (b) refer to the material in paragraph 89 of the Hartley-Dogauchi Report.[3]

38. Notwithstanding that deletion, the Working Group agreed to retain article 14 in the text and to keep both options in square brackets in the text, thus providing enacting States with a choice. Further explanation of that choice could be provided in the guide to enactment.

Article 15. Severability

39. The Working Group approved the substance of article 15 as drafted.

Article X. Recognition of an insolvency-related judgment under [*insert a cross reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency*]

40. After discussion, the Working Group approved the substance of article X as drafted, noting the need for a detailed explanation of its rationale and implementation in the guide to enactment.

Circulation of the draft text for comment

41. The Secretariat was requested to circulate the text of the draft model law as contained in the annex to this report to States for comment in early 2018. The text would be further reviewed at the forthcoming fifty-third session of the Working Group in order to submit it to the Commission for possible adoption at its fifty-first session in 2018.

V. Cross-border recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law (A/CN.9/WG.V/WP.151)

42. The Working Group agreed to note where revision of or addition to the material in the guide to enactment was required, bearing in mind that the guide to enactment would be updated to reflect the revisions agreed to the text of the model law in the current session. The following suggestions for amendment were made:

(a) In paragraph 2, to expand on the reasons for the development of the text;

(b) To shorten paragraph 5;

(c) In paragraph 7, to add further material on the issue of insolvency-relatedness;

(d) In paragraph 39, to address the relevance of article X (possibly also expanding the reference to article X in paragraph 29) and to delete the penultimate sentence;

(e) In paragraph 40, to resolve uncertainty as to the meaning of the second sentence;

(f) In paragraph 41, to include additional examples of other judgments that might raise public policy considerations;

(g) In paragraph 52, to delete the last sentence and to reorder the explanation as follows: to first explain why a judgment commencing an insolvency proceeding was excluded and then to discuss judgments issued on commencement, for example, the order appointing an insolvency representative, and why they should be considered insolvency-related judgments;

[3] 2005 Choice of Court Convention: Explanatory Report by Trevor Hartley and Masato Dogauchi.

(h) In paragraph 54, to consider the possible addition of further examples, such as a judgment requiring the examination of a director located in a third jurisdiction;

(i) In paragraphs 57 to 59 relating to article 3, to include reference to binding international agreements with entities other than States;

(j) In paragraph 69, to include an explanation that differences between this text and the MLCBI were not intended to indicate that a new approach was being taken under this text or that the idea of procedural fairness was not included under article 6 of the MLCBI;

(k) In paragraph 74, to reconsider the example to ensure that it did not unnecessarily raise the issue of enforcement;

(l) In paragraph 78, to further consider whether additional material was required;

(m) In paragraph 80, to indicate that, while the decision commencing an insolvency proceeding was not a judgment that could be recognized under this model law, it should nevertheless be provided as evidence of the existence of the insolvency proceeding to which the judgment related;

(n) In paragraph 86, to clarify the party to whom notice should be provided;

(o) In paragraph 90, to delete the phrase "as a matter of course";

(p) In paragraph 113, to consider providing further explanation of what the concept of "participation" might entail; and

(q) In paragraph 121, to consider providing additional guidance to lawmakers on how article X might be integrated into domestic law.

43. The Working Group was invited to provide the Secretariat with any suggested text to address the above issues.

VI. Facilitating the cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.152)

44. The Working Group commenced its discussions on the topic by reviewing the text of the draft legislative provisions contained in document A/CN.9/WG.V/WP.152, beginning with chapter 5, article 21.

[Part A]

Chapter 5. Treatment of foreign claims

Article 21. Commitment to and approval of the treatment of foreign claims in accordance with the applicable law: non-main proceedings [Treatment of foreign claims in this State in accordance with applicable law: non-main proceedings] [Commitment on the treatment of foreign claims to minimize commencement of non-main proceedings]

45. The Working Group agreed to replace the word "commitment" with "undertaking" (in all articles in chapter 5). Preference was expressed in favour of variant 2 of article 21, although there were suggestions that it could be redrafted to include both the idea of facilitating the treatment of claims and of minimizing the commencement of non-main proceedings. After discussion, it was suggested that paragraph 1 of variant 2 be used and that the title should reflect those revisions.

46. The following text was proposed for further consideration by the Working Group:

"**Undertaking on the treatment of foreign claims**

"To minimize the commencement of non-main proceedings and facilitate the treatment of claims in an enterprise group insolvency, a claim that could be

brought by a creditor of an enterprise group member in a non-main proceeding in another State may be treated in a main proceeding commenced in this State in accordance with treatment it would be accorded in the non-main proceeding, provided:"

47. With respect to the question raised in paragraph 54 of document A/CN.9/WG.V/WP.152, the Working Group was reminded of the conclusion taken during its fifty-first session as referred to in paragraph 131 of document A/CN.9/903. Some delegations observed that the main proceeding and the non-main proceeding referred to in article 21 were proceedings that could relate to both the same group member or to different group members.

Article 21 bis. Powers of the court of this State with respect to a commitment under article 21

48. The Working Group expressed a preference for variant 2, with the deletion of the words in square brackets. It was noted that the guide to enactment would explain the relevance of article 19 in respect of this provision. A suggestion to delete reference to the stay in subparagraph (b) was not supported.

[Part B]

Supplemental provisions

Article 22. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: main proceedings [Treatment of foreign claims in this State in accordance with applicable law: main proceedings] [Commitment on the treatment of foreign claims to minimize commencement of main proceedings]

49. On the basis of the compromise that had been reached in the Working Group in a previous session, a proposal to delete the headings "[Part B]" and "Supplemental provisions" did not receive support (see A/CN.9/864, paras. 38–53).

50. The revisions proposed by the Secretariat in paragraph 57 of document A/CN.9/WG.V/WP.152 were supported, and the Working Group agreed that the title of article 22 should be aligned with the revised title of article 21. It was noted that the word "would" in the first line of the provision should be replaced with "could".

Article 22 bis. Powers of a court of this State with respect to a commitment under article 22

51. The Working Group expressed a preference for variant 2, with the deletion of the words in square brackets. It was noted that the guide to enactment would explain the relevance of article 19 in respect of this provision. The question was raised as to whether the withdrawal of the words "or decline to commence" could contribute to the general acceptance of the supplemental provisions. This question did not elicit any comments from the Working Group.

Article 23. Additional relief

52. The question was raised as to whether additional relief should be made available under section 23 regardless of whether a State chose to enact the supplemental provisions. It was stated that on the basis of the compromise referred to in paragraph 49 above, additional relief for situations covered by article 23 would only be available if the supplemental provisions were adopted. The Working Group approved the substance of article 23 as drafted.

[Part A]

Chapter 4. Recognition of a foreign planning proceeding and relief

Article 14. Application for recognition of a foreign planning proceeding

53. As a matter of drafting, it was noted that paragraph 2 should indicate subparagraphs (a), (b) or (c) as alternatives. A proposal to replace paragraph 2 with the previous iteration in document A/CN.9/WG.V/WP.146 did not receive sufficient support. By way of clarification, it was recalled that proof of commencement of the proceeding that became the planning proceeding was not required on the basis that such commencement was a necessary precondition for appointment of the group representative.

54. With respect to paragraph 3, in response to the question raised in paragraph 27 of document A/CN.9/WG.V/WP.152, the Working Group agreed that the word "evidence" in subparagraph (a) should be replaced with "a statement".

55. With respect to the issues raised in paragraph 29 of document A/CN.9/WG.V/WP.152, the Working Group agreed to retain subparagraph 3(c) as drafted, except with respect to the issue raised in paragraph 30 of document A/CN.9/WG.V/WP.152; there was support for replacing "involved" with "subject to or participating in that proceeding", and discussing the difference between those two categories of group members in the guide to enactment.

Article 15. [Interim] [Provisional] relief that may be granted upon application for recognition of a foreign planning proceeding

56. The Working Group agreed to retain "Provisional" in the title without square brackets and to delete "[Interim]", to delete "appropriate" in paragraph 1, and to delete the words "[in any jurisdiction]" in paragraph 4 (and in article 17, paragraph 3, and article 13, paragraph 2).

57. With respect to the questions raised in paragraphs 21 and 22 of document A/CN.9/WG.V/WP.152 (which applied to articles 13, 15 and 17), it was agreed that, as a text for further consideration, the words "unless not commencing an insolvency proceeding is a consequence of an undertaking given under articles 21 or 22" should be inserted at the end of paragraph 4 (and to the equivalent paragraphs of articles 13 and 17). It was agreed that additional analysis was required to ensure that that draft text would address situations arising in connection with paragraph 4 in which articles 21 and 22 did not apply.

Article 16. Decision to recognize a foreign planning proceeding

58. The Working Group agreed to retain "material" in paragraph 4 without square brackets and to delete "[substantial]", and to retain the last sentence of that paragraph without square brackets, replacing "and" with "as well as".

59. A proposal to add a provision to the effect that stakeholders should have a right to be heard, along the lines of article 10 of the draft model law on recognition and enforcement of insolvency-related judgments, did not receive sufficient support.

Article 17. Relief that may be granted upon recognition of a foreign planning proceeding

60. The Working Group approved the substance of article 17 as drafted, noting the revisions to be made to align paragraph 3 with the equivalent paragraphs of articles 13 and 15.

Article 18. Participation of a group representative in a proceeding under [*identify laws of the enacting State relating to insolvency*]

61. The Working Group approved the substance of article 18 as drafted.

Article 19. Protection of creditors and other interested persons

62. The Working Group approved the substance of article 19 as drafted, notwithstanding a proposal to change the word "creditors" in paragraph 1 to text along the lines of "various classes of creditors" in order to provide greater clarity.

Article 20. Approval of local elements of a group insolvency solution

63. The Working Group agreed in both instances in paragraph 1 to retain the phrase "in this State" and delete the square brackets, to delete the phrase "and implement" in the square bracketed text in paragraph 3, and in paragraph 4 bis to replace "implement" with "confirm". The Working Group further agreed to retain paragraph 4 bis without square brackets.

64. After discussion, the Working Group agreed on the following approach to paragraph 4: (a) that it should address the situation in which no insolvency proceeding had commenced in the enacting State; (b) that the commencement of proceedings in that State, where unnecessary, was not being encouraged; (c) that the italicized bracketed text was inadequate to address how the State would give effect to a group insolvency solution in that situation; and (d) that further protection should be specified by adding text along the following lines to replace the italicized bracketed text: "a group insolvency solution shall have effect in this State if it has received all approvals required in accordance with the laws of this State." The Working Group also agreed that the last sentence in square brackets should be retained and that a revised text of paragraph 4 should be prepared to reflect those principles.

Chapter 1. General provisions

Preamble

65. The Working Group approved the substance of the preamble as drafted.

Article 1. Scope

66. After discussion, and based on a number of proposals made, the Working Group agreed that the opening phrase of variant 2 should be replaced with text along the following lines: "This law applies to enterprise groups where insolvency proceedings have commenced for one or more of its members", and that the concepts following the word "including" in the latter part of variant 2 should be retained for future discussion.

Article 2. Definitions

67. The Working Group approved the substance of subparagraphs (a), (b) and (c) as drafted.

68. In respect of subparagraph (d), it was agreed that the phrases, "[referred to] [as defined] in subparagraph (a)," and "as defined in subparagraph (b)" should be deleted.

69. After discussion of whether the term "group representative" was sufficiently descriptive, the Working Group approved the substance of subparagraph (e) as drafted.

70. The Working Group expressed its preference to retain variant 2 of subparagraph (f) and agreed to delete variant 1.

71. The Working Group agreed to retain the substance of subparagraph (g), as drafted, for further consideration. After discussion of articles 11 and 12, a further proposal was made along the following lines:

"(g) 'Planning proceeding' means the insolvency proceeding of an enterprise group member in which a group insolvency solution is being developed and implemented, and in which a group representative has been appointed, provided that:

"(i) The insolvency proceeding is one that has been commenced in a State that is the centre of main interests of the enterprise group member;

"(ii) The enterprise group member is a necessary and integral part of a group insolvency solution; and

"(iii) One or more other enterprise group members are participating or have indicated their intention to participate."

72. That proposal received some support, although there were some reservations with respect to the reference to "intention to participate" and the requirement that the group insolvency solution "is being developed and implemented" on the basis that those concepts departed from the text that had been agreed in article 2, paragraph (g) of the existing definition. It was suggested that the definition should also accommodate a particular type of coordination proceeding that had been developed under the European Insolvency Regulation. After further discussion, the Secretariat proposed a draft text combining subparagraph (g)(i) of the proposed text with the existing definition along the following lines:

"(g) 'Planning proceeding' means an insolvency proceeding commenced in respect of an enterprise group member at its centre of main interests provided:

"(i) One or more other enterprise group members are participating in that proceeding for the purpose of developing and implementing a group insolvency solution;

"(ii) The enterprise group member subject to the proceeding is a necessary and integral part of that group insolvency solution; and

"(iii) A group representative has been appointed."

73. The Working Group supported that proposal.

74. It was noted that the guide to enactment might need to address the following: (a) the possibility of multiple planning proceedings; and (b) additional definitions that might be required depending on the nature of the final text.

75. It was agreed that the word "multinational" should be deleted wherever it appeared in the text, including the title.

Article 2 bis. Jurisdiction of the enacting State

76. The Working Group agreed to retain in subparagraph (d) the phrase "no such obligation exists" without square brackets and to delete the phrase "[there is no obligation to commence such proceedings]", and approved the substance of article 2 bis as drafted.

Article 2 ter. Public policy exceptions

77. The Working Group approved the substance of article 2 ter as drafted.

Article 2 quater. Competent court or authority

78. The Working Group approved the substance of article 2 quater as drafted.

Chapter 2. Cooperation and coordination

Article 3. Cooperation and direct communication between a court of this State and foreign courts, foreign representatives and a group representative

79. The Working Group approved the substance of article 3 as drafted.

Article 4. Cooperation to the maximum extent possible under article 3

80. The Working Group approved the substance of article 4 as drafted.

Article 5. Limitation of the effect of communication under article 3

81. The Working Group approved the substance of article 5 as drafted.

Article 6. Coordination of hearings

82. The Working Group approved the substance of article 6 as drafted.

Article 7. Cooperation and direct communication between a group representative, foreign representatives and foreign courts

83. The Working Group approved the substance of article 7 as drafted.

Article 7 bis. Cooperation and direct communication between a [*insert the title of a person or body administering a reorganization or liquidation with respect to an enterprise group member under the law of the enacting State*], foreign courts, foreign representatives and a group representative

84. The Working Group approved the substance of article 7 bis as drafted.

Article 8. Cooperation to the maximum extent possible under articles 7 and 7 bis

85. A proposal that the proviso in subparagraph (a) should be deleted in order to facilitate the sharing of information did not receive support. The Working Group noted, however, that the concern expressed could be addressed in the guide to enactment. The substance of article 8 was approved as drafted.

Article 9. Authority to enter into agreements concerning the coordination of proceedings

86. The Working Group approved the substance of article 9 as drafted.

Article 10. Appointment of a single or the same insolvency representative

87. The Working Group approved the substance of article 10 as drafted, and noted that the guide to enactment should address the question of conflict of interest by reference to recommendations 116 and 233 of the UNCITRAL Legislative Guide on Insolvency Law.

Article 11. Participation by enterprise group members in a proceeding under [*identify laws of the enacting State relating to insolvency*]

88. The Working Group agreed to modify paragraph 1 by inserting "for the purpose of facilitating cooperation and coordination under chapter 2" before "including" in the final phrase.

89. In respect of the first sentence of paragraph 3, the Secretariat was requested to revise the text, taking into account article 10 of the MLCBI to provide greater clarity and certainty in describing the limited jurisdiction intended by the provision. The Secretariat was also requested to place the content of the second sentence in a separate paragraph.

90. The Working Group agreed that the guide to enactment should discuss the limits that might be applicable under domestic law to a group member's ability to opt in or out of participation in a planning proceeding under paragraph 4.

Chapter 3. Conduct of a planning proceeding in this State

Article 12. Appointment of a group representative

91. The Working Group agreed to retain the phrase "(i) and (ii)" and delete the square brackets in paragraph 1, to delete paragraph 2, to retain paragraph 3 and delete the square brackets, and to delete the text in square brackets in paragraph 4.

92. In response to the observation that article 18 did not contain the inbound authorization equivalent to subparagraph (4)(c), it was recalled, as noted in paragraph 44 of document A/CN.9/WG.V/WP.152, that that provision had been deleted at the last session of the Working Group.

Article 13. Relief available to a planning proceeding

93. The Working Group recalled that paragraph 2 of article 13 was to be revised in accordance with the equivalent paragraphs of articles 15 and 17, as noted above (see para. 57). The Working Group agreed to retain the words "or implementing" and to delete the square brackets surrounding them in paragraph 1.

VII. Obligations of directors of enterprise group companies in the period approaching insolvency

94. The Working Group noted the revised text on the obligations of directors of enterprise group members in the period approaching insolvency as contained in document A/CN.9/WG.V/WP.153 and that the text would be considered further when the work on enterprise groups was nearing completion.

VIII. Other business

95. The Working Group heard a brief introduction to a proposal by the United States for possible future work on civil asset tracing and recovery as contained in document A/CN.9/WG.V/WP.154. The Working Group exchanged preliminary views on the proposal, with a view to having a more considered discussion at a future session.

Annex

Draft model law on cross-border recognition and enforcement of insolvency-related judgments

Preamble

1. The purpose of this Law is:

(a) To create greater certainty for parties in regard to their rights and remedies for recognition and enforcement of insolvency-related judgments;

(b) To avoid the duplication of proceedings;

(c) To ensure timely and cost-effective recognition and enforcement of insolvency-related judgments;

(d) To promote comity and cooperation between jurisdictions regarding insolvency-related judgments;

(e) To protect and maximize the value of insolvency estates; and

(f) Where legislation based on the Model Law on Cross-Border Insolvency has been enacted, to complement that legislation.

2. This Law is not intended:

(a) To restrict provisions of the law of this State that would permit the recognition and enforcement of an insolvency-related judgment;

(b) To replace legislation enacting the Model Law on Cross-Border Insolvency or limit the application of that legislation;

(c) To apply to the recognition and enforcement in the enacting State of an insolvency-related judgment issued in the enacting State; or

(d) To apply to the judgment commencing the insolvency proceeding.

Article 1. Scope of application

1. This Law applies to the recognition and enforcement of an insolvency-related judgment issued in a State that is different to the State in which recognition and enforcement are sought.

2. This Law does not apply to [...].

Article 2. Definitions

For the purposes of this Law:

(a) "Insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are or were subject to control or supervision by a court for the purpose of reorganization or liquidation;

(b) "Insolvency representative" means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the insolvency proceeding;

(c) "Judgment" means any decision, whatever it may be called, issued by a court or administrative authority, provided an administrative decision has the same effect as a court decision. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses by the court. An interim measure of protection is not to be considered a judgment for the purposes of this Law;

(d) "Insolvency-related judgment":

(i) Means a judgment that:

a. Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and

b. Was issued on or after the commencement of that insolvency proceeding; and

(ii) Does not include a judgment commencing an insolvency proceeding.

Article 3. International obligations of this State

1. To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

2. This Law shall not apply to a judgment where there is a treaty in force concerning the recognition or enforcement of civil and commercial judgments, and that treaty applies to the judgment.

Article 4. Competent court or authority

The functions referred to in this Law relating to recognition and enforcement of an insolvency-related judgment shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*] and by any other court before which the issue of recognition is raised as a defence or as an incidental question in the course of proceedings.

Article 5. Authorization to act in another State in respect of an insolvency-related judgment issued in this State

A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to act in another State with respect to an insolvency-related judgment issued in this State, as permitted by the applicable foreign law.

Article 6. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance under other laws of this State.

Article 7. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State.

Article 8. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

Article 9. Effect and enforceability of an insolvency-related judgment

An insolvency-related judgment shall be recognized only if it has effect in the originating State and shall be enforced only if it is enforceable in the originating State.

Article 9 bis. Effect of review in the originating State on recognition and enforcement

1. Recognition or enforcement of an insolvency-related judgment may be postponed or refused if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired. In such cases, the court may also make recognition or enforcement conditional on the provision of such security as it shall determine.

2. A refusal under paragraph 1 does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 10. Procedure for seeking recognition and enforcement of an insolvency-related judgment

1. An insolvency representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment may seek recognition and enforcement of that judgment in this State. The issue of recognition may also be raised as a defence or as an incidental question in the course of proceedings.

2. When recognition and enforcement of an insolvency-related judgment is sought under paragraph 1, the following shall be submitted to the court:

(a) A certified copy of the insolvency-related judgment; and

(b) Any documents necessary to establish that the insolvency-related judgment has effect and, where applicable, is enforceable in the originating State, including information on any pending review of the judgment; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence on those matters acceptable to the court.

3. The court may require translation of documents submitted pursuant to paragraph 2 into an official language of this State.

4. The court is entitled to presume that documents submitted pursuant to paragraph 2 are authentic, whether or not they have been legalized.

5. Where recognition and enforcement are sought, the party against whom relief is sought has the right to be heard.

Article 11. Provisional relief

1. From the time recognition and enforcement of an insolvency-related judgment is sought until a decision is made, where relief is urgently needed to preserve the possibility of recognizing and enforcing an insolvency-related judgment, the court may, at the request of an insolvency representative or other person entitled to seek recognition and enforcement under article 10, paragraph 1, grant relief of a provisional nature, including:

(a) Staying the disposition of any assets of any party or parties against whom the insolvency-related judgment has been issued; or

(b) Granting other legal or equitable relief, as appropriate, within the scope of the insolvency-related judgment.

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice, including whether notice would be required under this article.*]

3. Unless extended by the court, relief granted under this article terminates when a decision on recognition and enforcement of the insolvency-related judgment is made.

Article 12. Decision to recognize and enforce an insolvency-related judgment

Subject to articles 7 and 13, an insolvency-related judgment shall be recognized and enforced provided:

(a) The requirements of article 9, paragraph 1 with respect to effectiveness and enforceability are met;

(b) The person seeking recognition and enforcement of the insolvency-related judgment is an insolvency representative within the meaning of article 2, subparagraph (b), or another person entitled to seek recognition and enforcement of the judgment under article 10, paragraph 1;

(c) The application meets the requirements of article 10, paragraph 2; and

(d) Recognition and enforcement is sought from a court referred to in article 4, or the question of recognition arises by way of defence or as an incidental question before such a court.

Article 13. Grounds to refuse recognition and enforcement of an insolvency-related judgment

In addition to the ground set forth in article 7, recognition and enforcement of an insolvency-related judgment may be refused if:

(a) The party against whom the proceeding giving rise to the judgment was instituted:

(i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or

(ii) Was notified of the institution of that proceeding in a manner that is incompatible with fundamental principles of this State concerning service of documents;

(b) The judgment was obtained by fraud;

(c) The judgment is inconsistent with a judgment issued in this State in a dispute involving the same parties;

(d) The judgment is inconsistent with an earlier judgment issued in another State in a dispute involving the same parties on the same subject matter, provided the earlier judgment fulfils the conditions necessary for its recognition and enforcement in this State;

(e) Recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings, including by conflicting with a stay or other order that could be recognized or enforced in this State;

(f) The judgment:

(i) Materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; and

(ii) The interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

(g) The originating court did not satisfy one of the following conditions:

(i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;

(ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that the defendant argued on the merits before the court without objecting to jurisdiction or to the exercise of jurisdiction within the time frame provided in the law of the originating State, unless it was evident that such an objection to jurisdiction would not have succeeded under that law;

(iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or

(iv) The court exercised jurisdiction on a basis that was not incompatible with the law of this State;

States that have enacted legislation based on the Model Law on Cross-Border Insolvency might wish to enact subparagraph (h)

(h) The judgment originates from a State whose insolvency proceeding is not or would not be recognizable under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*], unless:

(i) The insolvency representative of a proceeding that is or could have been recognized under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*] participated in the proceeding in the originating State to the extent of engaging in the substantive merits of the cause of action to which that proceeding related; and

(ii) The judgment relates solely to assets that were located in the originating State at the time the proceeding in the originating State commenced.

Article 14. Equivalent effect

1. An insolvency-related judgment recognized or enforceable under this Law shall be given the same effect it [has in the originating State] [would have had if it had been issued by a court of this State].

2. If the insolvency-related judgment provides for relief that is not available under the law of this State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.

Article 15. Severability

Recognition and enforcement of a severable part of an insolvency-related judgment shall be granted where recognition and enforcement of that part is sought, or where only part of the judgment is capable of being recognized and enforced under this Law.

States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency will be aware of judgments that may have cast doubt on whether judgments can be recognized and enforced under article 21 of the Model Law. States may therefore wish to consider enacting the following provision:

Article X. Recognition of an insolvency-related judgment under [*insert a cross reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*]

Notwithstanding any prior interpretation to the contrary, the relief available under [*insert a cross reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency*] includes recognition and enforcement of a judgment.